This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 3/12/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
GIUSEPPE SCALERA,	)	
	)	CHARGE NO. **1997CF1270**
Complainant,	)	EEOC NO. **21B990529**
	)	ALS NO. **11112**
and	)	
	)	
VILLAGE OF OAK PARK,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Chicago, Illinois on October 22, 2001 through October 26, 2001 and October 29, 2001 to October 30, 2001. Complainant and Respondent have filed a post-hearing brief, respectively. On July 3, 2002, both Complainant and Respondent filed a Reply Brief, respectively. Accordingly, this matter is ripe for decision.

Contentions of the Parties

In the instant case, Complainant contends that he was the victim of retaliation after he filed a Charge of discrimination with the Illinois Department of Human Rights against the Respondent. Complainant contends that he suffered adverse actions when he was suspended by Respondent for five (5) days and then terminated. Complainant argues that a causal nexus exists between his protected activity and the suspension and termination. Complainant further argues that Respondent's proffered reasons and explanations are pretextual. Complainant also contends

that a similarly situated employee who did not engage in a protected activity was treated more favorably by Respondent.

Respondent asserts that Complainant has not established a *prima facie* case of retaliation. Respondent contends that Complainant has failed to present an employee who was similarly situated with Complainant. Respondent also contends that the time period between the filing of Complainant's IDHR Charges and his suspension does not create an inference of discrimination. Respondent further argues that they have articulated legitimate, nondiscriminatory reasons for its adverse actions, and that Complainant failed to establish that the reasons were a pretext for retaliation.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. Complainant is a 54 year old male of Italian descent.

2. Complainant was hired as a laborer by Respondent Village of Oak Park, Water and Sewer Division on July 20, 1981.

3. On September 8, 1998, Respondent suspended Complainant for five (5) days for disregarding his supervisor's instructions regarding where to dig, damaging an underground cable.

4. On November 9, 1998, Respondent discharged Complainant because he failed to use a spotter when backing up one of Respondent's vehicles, which resulted in an accident; because he failed to file an accident report and failed to immediately notify his supervisor of the accident.

5. Respondent has a long-standing policy which requires the use of a spotter at the rear of all vehicles being backed up. Employee meetings were regularly conducted at both the

Department and Division levels during which safety issues, including the spotter policy, were discussed.

6. In January of 1990, the Respondent adopted its "Public Works Safety Manual," which cited a spotter policy. Complainant acknowledged that he received a copy of the Personnel Manual for the Village of Oak Park on August 29, 1996 and May 22, 1997.

7. On March 29, 1994, Complainant damaged a private vehicle while operating a bobcat tractor. Complainant received a written warning and counseling and was informed that such warning could lead to a suspension or termination.

8. Complainant admitted that there was a spotter policy in place on March 29, 1994.

9. On June 1, 1995, Complainant ran into a pole in an alley while driving a Village vehicle. Complainant failed to use an outside spotter while backing up, as required by the spotter policy. Complainant did not report the accident until the following day, despite the fact that he spoke to Sheila Atkins, the Assistant Village Manager, on the date of the accident.

10. Complainant was suspended as a result of the June 1, 1995 accident. Complainant was aware that he was required to report the accident immediately, pursuant to the Village Personnel Manual. The passenger of the vehicle at the time of the incident, Ubaldo Catacchio, was given a written warning for his failure to report his involvement in the accident.

9. On June 1, 1995, Assistant Village Manager Sheila Atkins recommended to Complainant's union representative that Complainant utilize Respondent's Employee Assistance Program in order to address any issues that might be affecting his job performance.

10. On March 31, 1997, Complainant filed a Charge of discrimination against Respondent with the IDHR; Charge No. 1997CA2331. In July of 1997, Francis Joseph Euclide became the Director of Public Works for Respondent. On August 7, 1997, Complainant filed a

Charge of discrimination and retaliation with the IDHR; Charge No. 1998CF0359. Shortly after the August 7, 1997 date, Euclide became aware that Complainant had filed Charges of discrimination against Respondent.

11. On December 22, 1997, Complainant and Respondent, through Euclide, signed a settlement agreement which resolved and disposed of the Charges filed by the Complainant. A disciplinary matter involving repairs at a wrong address on October 30, 1996 was to be expunged from Complainant's file.

12. On January 16, 1998, Complainant was given a verbal warning for violating the spotter policy as a result of failing to properly check the back of a moving truck.

13. As a result of the January 16, 1998 incident, a meeting was conducted with all Water and Sewer employees in order to review Respondent's spotter policy, which Complainant attended. On February 24, 1998, a safety meeting for the employees of the Water and Sewer Division was conducted addressing backing up procedures. Complainant attended and admitted that the spotter policy was discussed at the meeting.

14. Thereafter, prior to July of 1998, a written form of the policy was drafted and issued to the employees, including Complainant. The written policy was the same as the existing policy. Also, safety meetings were held monthly, which Complainant attended.

15. On August 3, 1998, while at a work site, Complainant was cited for ignoring his supervisor's orders and the warnings of fellow workers to stop digging with a backhoe, which caused serious and expensive damage to a telephone cable. Complainant was suspended for five (5) days as a result of the incident. Complainant did not file a union grievance appealing the suspension.

16. On November 3, 1998, Complainant was cited for his failure to notify his supervisor or anyone else of an accident involving a police vehicle, and his failure to submit a report on the date of the accident. Complainant submitted an accident report on November 5, 1998, two days after the accident.

17. On November 5, 1998, Euclide, Speciale and McGloon met with Complainant to discuss the November 3, 1998 incident. When McGloon asked Complainant what if a small child had been behind the Vactor, his reply was that "the child should not be there." As a result of Complainant's remarks and behavior during the meeting, McGloon recommended that Complainant be terminated.

18. At the time McGloon made the recommendation to terminate Complainant, he was not aware of the IDHR Charges filed by the Complainant on March 31, 1997 and August 7, 1997.

19. A termination letter was drafted by Rodney Marion, Respondent's Human Resources Director, and issued to Complainant on November 9, 1998. The letter contained a summary of work violations starting from April 22, 1989 up to and including September 8, 1998. The termination letter also contained an entry for "Poor Performance" for an incident that occurred on November 1, 1996, for which a written warning was issued against Complainant.

20. Prior to issuing the termination letter to Complainant, Rodney Marion discussed the letter with Ray Wiggins, the Assistant Village Manager. Marion recommended that the Complainant be terminated and Wiggins concurred. Marion and Wiggins were not aware of the IDHR Charges that were filed against Respondent on March 31, 1997 and August 7, 1997 by Complainant.

21. Respondent did not base the termination of Complainant on a prior disciplinary

matter that was to be expunged from his personnel file pursuant to a December 22, 1997, settlement agreement.

22. On March 9, 1998, Disby Seals, a laborer for Respondent, was involved in a vehicular accident in which he properly notified the Respondent and made out a timely report of the accident. Seals was not disciplined for the accident, but was cited for failure to produce a valid driver's license. Seals was given until June 5, 1998 to obtain his license and return to work, which he did. Seals' prior disciplinary record at the time did not show any safety-related violations.

23. Disby Seals did not damage a water main while employed with Respondent.

Conclusions of Law

1. Complainant is an "employee" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/2-101(A)(1)(a) and 5/2-101(B)(1)(a), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant has failed to establish a *prima facie* case of retaliation.

4. Complainant has failed to produce a similarly situated employee who was treated more favorably.

5. Respondent articulated legitimate, nondiscriminatory reasons for its adverse actions in placing Complainant on a five (5) day suspension and ultimately terminating him.

6. Complainant has failed to establish that the reasons given by Respondent were a pretext for retaliation.

7. Complainant has failed to show a casual nexus exist between Complainant's protected activity and the suspension and termination.

8. Complainant has failed to show that the time period between the filing of his IDHR Charges and his suspension created an inference of discrimination.

Determination

Complainant has failed to establish a *prima facie* case of retaliation as prohibited by Section 6-101(A) of the Act. Complainant has also failed to prove by the preponderance of the evidence that the reasons given by Respondent for his suspension and termination were pretextual.

Discussion

Complainant states that he has presented sufficient evidence to establish a *prima facie* case of retaliation and has proven by a preponderance of the evidence that Respondent retaliated against him. Complainant further states that he was shown that Respondent's justification for his suspension and ultimate termination were pretextual. Complainant also states that a comparable employee was treated more favorably than he was.

Respondent states that Complainant has failed to establish a *prima facie* case of retaliation. Respondent further states that the comparable employee named by Complainant is not similarly situated to that of Complainant.

The vital issue presented in this case is whether Complainant has established a *prima facie* case of retaliation. In this instance, there has been no direct evidence introduced. Therefore, Complainant must prove his claim by utilizing the indirect method of proof found in the cases followed by the Human Rights Commission.

In analyzing employment discrimination actions brought under the Act, the Illinois Supreme Court adopted the same three-part test enunciated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Zaderaka v. Illinois Human Rights Commission, 131 Ill. 2d 172, 545 N.E.2d 684 (1989).

The three step analysis as stated in Zaderaka provides that: 1) a complainant must establish by a preponderance of the evidence a *prima facie* case of unlawful dicrimination. If a prima facie case is established, a rebuttable presumption arises that the employer unlawfully discriminated against complainant, 2) to rebut the presumption, the employer just articulate, not prove, a legitimate, nondiscriminatory reason for its decision, and 3) if the employer carries its burden of production, the presumption of unlawful discrimination falls and complainant must then prove by a preponderance of the evidence that the employer's articulated reason was not its true reason, but instead a pretext for unlawful discrimination. This merges with complainant's ultimate burden of persuading the trier of fact that the employer unlawfully discriminated against complainant. This ultimate burden remains at all time with complainant. Zaderaka, 131 Ill. 2d at 178-79, 545 N.E.2d 684.

In order to establish a *prima facie* case of retaliation under Section 6.1-1 of the Act, a Complainant must prove three elements. The Complainant must prove 1) that he engaged in a protected activity, 2) that Respondent took an adverse action against him, and 3) that there was a causal nexus exits between the protected activity and Respondent's adverse action. Carter Coal Co. v. Human Rights Commission, 261 Ill.App.3d1, 633 N.E.2d 202 (5th Dist. 1994).

Under the analysis described above, I find that it is undisputed that Complainant was engaged in a protected activity based on the fact that he filed two Charges of discrimination against Respondent with the Illinois Department of Human Rights in 1997. The second prong of

establishing a *prima facie* case is satisfied because the five-day suspension and termination that Complainant received clearly constitute adverse action, which relates to a term or condition of employment. Champion and Blue Cross and Blue Shield Ass'n, __ Ill. HRC Rep. __, (1988CF0062, June 27, 1997).

The remaining issue left in the *prima facie* analysis for retaliation is whether a causal nexus exits between the protected activity and Respondent's adverse action. There are three ways in which a complainant can establish the necessary "causal nexus" required to prove a *prima face* case of retaliation under the Act. Those methods are: 1) showing direct evidence of retaliation; or 2) showing evidence of unequal treatment of similarly situated persons who did not engage in the protected activity; or 3) establishing that the time period between the protected activity and the adverse action is short enough to create an inference of "connectedness." Mitchell and Local Union 146, 20 Ill. HRC Rep. 101, 110-11 (1985). In this instance, Complainant has attempted to show a causal nexus between his suspension and termination, and the filing and pursuit of his charges of discrimination by using methods two and three stated above. Neither of these methods was persuasive.

Complainant attempted to show that another similarly situated employee who did not file a Charge of discrimination with the Department was treated more favorably. In this analysis, the Complainant is required to show that a similarly situated employee had violated the same or similar rules, but was treated more favorable. Complainant refers to the September 8, 1998 suspension where he was charged with damaging a telephone cable while at a dig site. Complainant claims that he was an eyewitness to an incident involving a comparative employee by the name of Disby Seals, who punctured a water main during a dig. Complainant testified that this incident occurred shortly after the August 3, 1998 incident with the cable. Complainant

claimed that Mr. Seals, who did not file a IDHR Charge of discrimination, was never disciplined for the incident. Complainant further argued that his suspension was merely a pretext for retaliation because the evidence regarding the incident was unreliable, contrived and unworthy of credence.

The record shows that on August 3, 1998, Complainant was assigned to a dig job along with other workers. Complainant was instructed to use a backhoe machine to dig up to a metal probe placed in the ground by Supervisor Dan McGloon. Once he reached the probe, he was instructed to dig by hand to expose an Ameritech cable.[1] Complainant ignored his supervisor's orders and the warnings of fellow workers and continued digging with the backhoe, causing serious and expensive damage. Complainant was suspended for five (5) days as a result of the incident. Complainant did not file a union grievance appealing the suspension. The evidence further shows that a thorough investigation into the matter was conducted by Respondent. There is nothing in the record to support Complainant's testimony that Ms. Seals was involved in an incident in which a water main was broken. Palpably, Complainant has failed to show that a similar employee who caused damage during a dig was treated more favorably.

Complainant further attempted to show disparate treatment at the time of his termination on November 9, 1998 for failure to adhere to the "back-up/spotter" policy and for ignoring directives not to dig near the telephone cable on August 3, 1998. Complainant states that on March 9, 1998, Disby Seals was involved in an accident in which he struck a parked car with a snowplow he was driving, while on a suspended license. Complainant claims that Mr. Seals was treated more favorably in that he received a three week suspension and given a final warning, but

[1] A joint utility locate ("Julie") was made prior to the dig, and a call was made for a re-Julie when the crew discovered an unmarked duct line.

not terminated, even though his work record showed that he had three prior accidents and had received discipline and was given a final warning.

The record shows that on November 3, 1998, Complainant was involved in the removal and clean-up of a tree stump near 945 N. Fair Oaks Avenue in Oak Park. Complainant was working a Vactor, which is a truck with a vacuum unit. During that time, Officer Brian Slowiak, an Oak Park Police Officer, parked his police vehicle behind the Vactor. Complainant backed up the Vactor without a spotter and struck the police vehicle on the front grill, causing a small crease to the grill. Complainant spoke with Officer Slowiak about the accident and Officer Slowiak then left the scene. Complainant clocked out for the day while Supervisor McGloon was in his office. Complainant did not notify McGloon or anyone else of the accident, nor was a report submitted on the date of the accident. Complainant spoke to McGloon about the accident the following day when McGloon called him into his office. Complainant submitted an accident report on November 5, 1998, two days after the accident.

The record further that on March 9, 1998, Disby Seals, a laborer for Respondent, was involved in a vehicular accident in which he properly notified the Respondent and made out a timely report of the accident. Seals was not disciplined for the accident, but was cited for failure to produce a valid driver's license. Seals was given until June 5, 1998 to obtain his license and return to work, which he did. Seals' prior disciplinary record at the time did not show any safety-related violations. Again, Complainant has failed to show that a similarly situated employee who violated the safety-related backup policy on numerous occasions was treated more favorably.

Next, Complainant argues that the time frame from which Complainant's supervisor became aware of the IDHR Charges and the adverse action taken against him was within the time

frame in which a nexus has been found to exist. (Citing, Maye v. Human Rights Comm'n., 224 Ill.App.3d at 362, 166 Ill.Dec. at 598, 586 N.E2d at 556.)

The facts show that the five day suspension was given to Complainant a year and six months from the date of his first Charge, and a year and one month after the second Charge was filed. Complainant's termination came twenty months from the date of his first Charge and fifteen months after the second Charge was filed. A *prima facie* case of retaliatory discharge can be established by showing a short span between the time a competent employee filed a discrimination charge and the time of the employer's adverse action. State v. Human Rights Commission, 178 Ill.App.3d 1033, 534 N.E.2d 161 (1989). In this instance, it is clear by the Commission's own precedence that the time frame involved does not raise an inference of a causal connection between the adverse act and the protected activity because the time span is not short, nor are the times involved in close proximity to each other. (See, Stancil and Moo and Oink, Inc., Ill. HRC (1989CF1534, November 22, 1993) at 5, citing, Thomas and Merrill Dow Pharmaceutical, 14 Ill. HRC Rep. 8 (1984).

Lastly, Complainant contends that Respondent's explanation for its suspension and termination of Complainant were pretextual. Since Respondent articulated a legitimate, non-discriminatory reason for its actions, Complainant need not prove a *prima facie* case of discrimination, but is still required to prove Respondent's articulated reasons were merely a pretext for unlawful discrimination. Johnson v. Human Rights Comm., 318 Ill.App.3d 582 at 588, 742 N.E.2d 793 (2000), citing, Clyde v. Human Rights Comm., 206 Ill.App.3d 283, 293, 564 N.E.2d 265 (1990).

The record shows that on November 5, 1998, Euclide, Speciale and McGloon met with Complainant to discuss the November 3, 1998 Vactor truck incident. Prior to the meeting,

McGloon contemplated giving Complainant a one to three day suspension for the incident. Euclide conducted the meeting and questioned Complainant regarding the accident. During the meeting, Complainant became irate and boisterous. When McGloon asked Complainant what if a small child had been behind the Vactor, his reply was that "the child should not be there." As a result of Complainant's remarks and behavior during the meeting, McGloon instead recommended that Complainant be terminated. At the time of the recommendation, McGloon was not aware of the IDHR Charges filed by the Complainant on March 31, 1997 and August 7, 1997.

The record further shows that a termination letter was drafted by Rodney Marion, Respondent's Human Resources Director, and issued to Complainant on November 9, 1998. The letter contained a summary of work violations starting from April 22, 1989 up to and including September 8, 1998. The termination letter also contained an entry for "Poor Performance" for an incident that occurred on November 1, 1996, for which a written warning was issued against Complainant. Prior to issuing the termination letter to Complainant, Rodney Marion discussed the letter with Ray Wiggins, the Assistant Village Manager. Marion recommended that the Complainant be terminated and Wiggins concurred. Marion and Wiggins were not aware of the IDHR Charges that were filed against Respondent on March 31, 1997 and August 7, 1997 by Complainant. As such, Respondent did not base the termination of Complainant on a prior disciplinary matter that was to be expunged from his personnel file pursuant to a December 22, 1997 settlement agreement.

I did not find Complainant's testimony concerning the two incidents which resulted in his suspension and ultimate termination to be credible. Complainant has demonstrated through his testimony a lack of perception as to the consequences of his actions. Complainant systematically

refused to accept any type of responsibility concerning safety-related issues and placed the blame on everyone around him, but himself. This total disregard for the safety of others was well evinced by his statement that "a child should not be there" when asked what if a child had been standing behind the large truck he was backing up. This demonstration of callousness on the part of Complainant would have been sufficient grounds alone to terminate him. Complainant was aware of the spotter policy which required a person to direct the driver of any vehicle that is being backed up. As such, I find that the articulated reasons given by Respondents for the Complainant's suspension and termination were not pretextual.

Recommendation

Based upon the findings of fact and conclusion of law stated above, I recommend that the instant Complaint and underlying Charges of Discrimination against Village of Oak Park, Water and Sewer Division be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

NELSON E. PEREZ
Administrative Law Judge
Administrative Law Section

ENTERED: September 23, 2002